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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

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No. 991  
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CAPITOL GREYHOUND LINES AND CAPITOL GREY-  
HOUND LINES OF INDIANA, INC.,

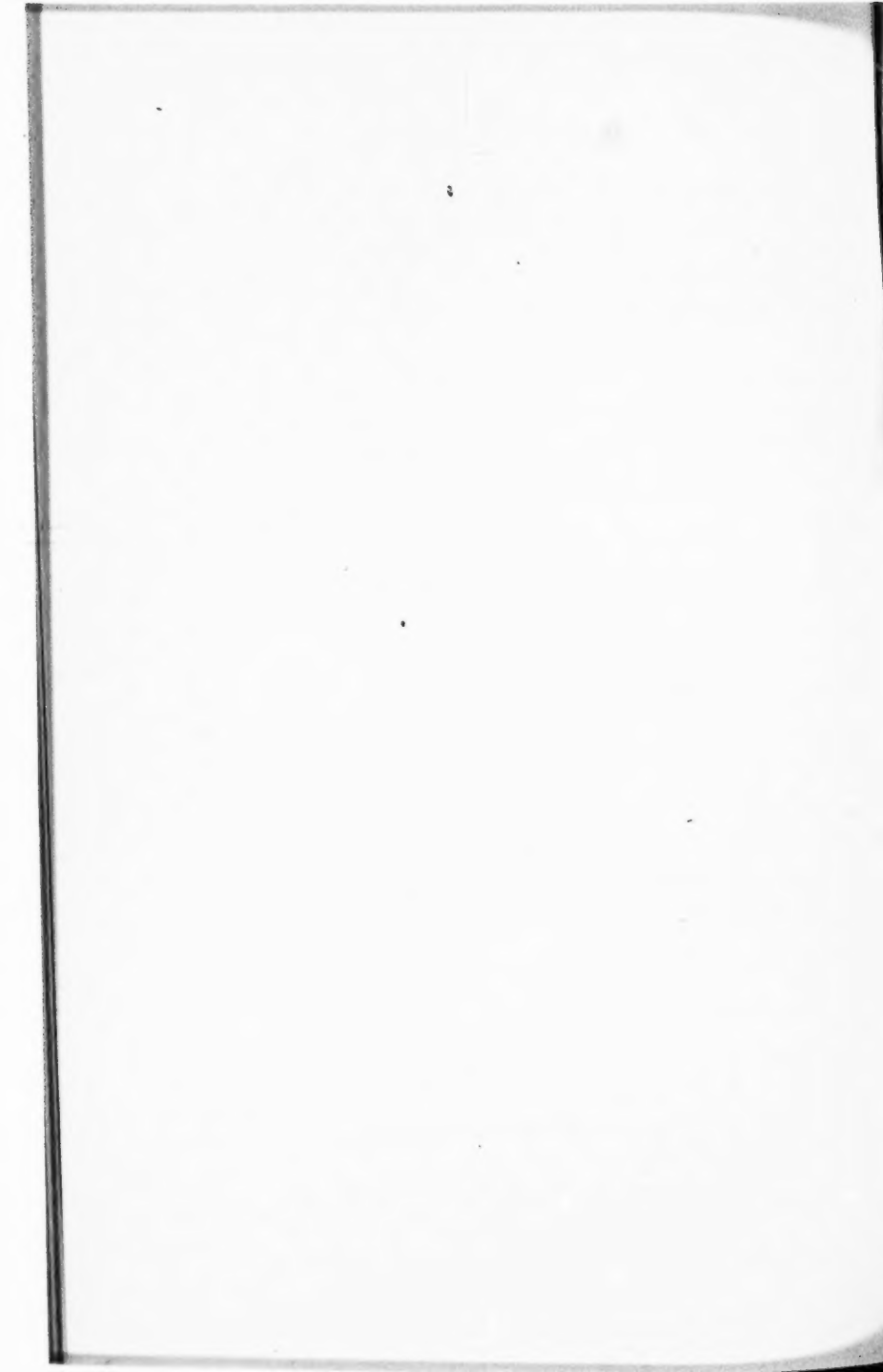
*Petitioners,*

*vs.*

NATIONAL LABOR RELATIONS BOARD.

—  
PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT  
THEREOF.  
—

THOMAS L. TALLENTIRE,  
LEONARD GARVER, JR.,  
*Counsel for Petitioners.*



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CAPITOL GREYHOUND LINES AND CAPITOL GREY-  
HOUND LINES OF INDIANA, INC.,

*vs.*

*Petitioners,*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI.**

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*To the Honorable the Supreme Court of the United States:*

**Matter Involved.**

The matter involved is whether the National Labor Relations Board in the conduct of its affairs is authorized (after agreeing in writing (R. 129-131) with the Petitioners for the holding of a consent election and setting forth in said consent agreement a list of voters eligible to participate) to ignore the provisions of the consent agreement and to exclude from said list of employees certain classes of persons, including among others, to-wit:

1. Those on the list who may be ill and consequently unable to appear at the polls to vote.

2. Those employees who by reason of unexpected change in schedules are unable to reach any of the polling places while the polls are open.

3. Those eligible employees who, although specifically named on the list, have been inducted in the military service of the United States and by reason thereof are unable to appear in person at the polls and vote.

4. By counting the vote of one ineligible to vote.

5. By refusing to rule as to a vote improperly challenged.

The most important effect of the decision of the Circuit Court of Appeals, is to deny (although otherwise deemed eligible by the Board) to an employee of the Company, who is in the military service of the United States, the right to cast a vote in determining who is to be the bargaining agent for the particular unit of which he may be a member, unless he is able to appear in person when the polls are open. Insofar as we have been able to determine, this question has never before been in this Court for determination and in view of the fact that millions of our citizens are now in the armed forces, its importance becomes self-evident.

The instant case was decided January 31, 1944 by the Circuit Court of Appeals, Sixth Circuit, in an opinion written by Judge Martin, concurred in by Judge Hamilton and Judge McAllister and published in 140 F. (2d) 754. A petition for rehearing was filed on the 29th day of February, 1944 and denied by the Court on the 7th day of April, 1944. The statutory provisions to sustain the jurisdiction of this Court are found in Judicial Code Sec. 240 as amended in 28 U. S. C. A. Sec. 347 and the statute of the United States which is involved is known as the National Labor Relations Act. The pertinent parts of the Act are set forth in the appendix.

The consent agreement provided that

“the determination of the Regional Director shall be final and binding upon any question (including questions as to the eligibility of voters) raised by either party hereto relating in any manner to the election *and not specifically covered in this agreement.*” (Italics ours.)

The Board, in its dealings in this case, left all questions arising out of the election to the determination of the Regional Director, ignoring completely the extremely important modification of his power as provided in the consent agreement, to-wit: that his powers to determine questions only extended to

“*matters not covered in this agreement*” (R. 129-131).

Although the Regional Director was granted broad powers in the consent agreement, he did not have the right to disfranchise any eligible voter, either directly, by forbidding him to vote, or indirectly, by failing to make fair and adequate provisions to enable all eligible persons to cast their ballots.

The Court, as stated in its opinion, committed the same error, and felt constrained that its power to review any action of the National Labor Relations Board was extremely limited in this class of cases and that even

“inferences of the Board were binding on the reviewing Court.” (See Syllabus *supra*.)

It is averred that the Court erred in that it ignored the legal principles involved in a consent election carried out under a contractual agreement.

### **Facts.**

Upon petition (R. 127) filed on August 8, 1942 by the Amalgamated Association of Street, Electric Railway and

Motor Coach Employees of America, Div. 1299, A. F. L., hereinafter called the Union, with the National Labor Relations Board, hereinafter called the Board, for investigation and certification of representatives, an election was held on September 2, 1942 under "Agreement for Consent Election" (R. 129-131) entered into on the 22nd day of August, 1942, by and between Capitol Greyhound Lines and Capitol Greyhound Lines of Indiana, Inc. (designated in said agreement as Capitol Greyhound Lines and Subsidiaries), hereinafter called Petitioners, and the Union; the terms of such agreement being approved by the Regional Director of the Ninth Region of the Board. The Unit for the purpose of such election was "all bus drivers". Ballots were cast at polls located in Cincinnati, Ohio; Louisville, Kentucky; Flora, Illinois; St. Louis, Missouri; Clarksburg, West Virginia and Washington, D. C.; places and times of the day for voting being set forth in a schedule marked "Annex A" (R. 133) attached to such agreement and an eligible list of voters being attached as "Annex B" (R. 133) to such agreement.

"Certification of Counting and Tabulation of Ballots" (R. 143) dated September 4, 1942, prepared by the Regional Director of the Board, discloses that there was a total of seventy-three names on the eligible list, that a total of sixty-three ballots were cast, out of which total one ballot was challenged and that the result of the election, excluding the challenged ballot, was thirty-two votes cast for the Union as the collective bargaining agent of the Unit and thirty votes cast against said Union as such bargaining representative.

Timely objections to the conduct of the ballot (R. 147) and the determination of results based thereon were filed with the Regional Director by Petitioners, in which Petitioners complained that the ballot taken was incomplete and



that the determination of a collective bargaining representative based thereon is not an accurate, true and fair determination of the question submitted.

Petitioners, in such Objections, complained that although the eligible list of voters contained seventy-three names, the name of John E. Nolan appeared on such list through error in that the pay-roll period ending August 15 was inadvertently used instead of the pay-roll period ending July 31, 1942, as provided for in the Consent Election Agreement, with the result that Nolan was permitted to vote despite the fact that he was not a bus driver for Petitioners during the pay-roll period ending July 31, 1942; further that one Clyde O. Thomas was first denied the right to vote, and finally, upon being permitted to vote by order of the Regional Director, his vote was challenged and not included in counting of the ballots; further that no provision was made prior to the election for securing the vote of four of Petitioners' bus drivers that were then and are now in active military service of the United States, such drivers being Bruce R. Radeliff, Charles H. Cole, William H. Fite and William E. Lynch; further that two bus drivers, namely, Elwin E. Haines and William M. Fritz, were deprived of their right to vote by reason of the fact that they were ill and confined to their homes on election day and that no provision was made before the election to secure their votes. Petitioners further complained that two bus drivers, Charles A. Smith and Burton E. Holcomb, were deprived of their right to vote by reason of the fact that the schedule operated by Smith on the day of the election did not permit him to get to the polls until after same were closed and by reason of the fact that Holcomb, at an early hour on the morning of the election day, was assigned to operate a charter bus for transporting selectees from Leesburg, Virginia, to the

induction center at Charlottesville, Virginia, with the result that he was unable to get back to Washington, D. C., until after the polls were closed and that no provision was made before the election to secure their votes.

Petitioners, in such Objections, requested that the vote of Thomas be counted; that the vote of Nolan be eliminated; that provision be made to secure the votes of those deprived of their right to vote because of illness, inability to reach the polls before same were closed and by reason of being in the military service of the United States, before a determination of a representative for collective bargaining based on the results of the balloting was made, or in the alternative that said election be set aside and held for naught, and that a new election be held under the direction and supervision of the Board.

On November 24, 1942, the Regional Director made his "Report on Consent Election" (R. 150), in which report he found and determined that the Union had been designated and selected by a majority of the employees in the agreed unit as the exclusive bargaining representative of the employees within the unit.

On November 27, 1942 Petitioners filed a "Notice of Appeal" (R. 263) and "Petition for Review" (R. 265) with both the Regional Director and the Board in Washington and on December 4, 1942 the Board rejected said Petition without a hearing (R. 264) on the ground that the Petitioners had no right to appeal to the Board the Regional Director's rulings on objections in view of the fact that the election was conducted by the Regional Director under a consent election agreement.

On December 17, 1942, Petitioners filed a "Petition for Declaratory Judgment" in the District Court of the United States, Southern District of Ohio, Western Division, same being docketed as Case No. 603 (R. 77) in which action Petitioners sought the judgment of the Court as to whether

the Union is the exclusive bargaining representative of Petitioners' bus drivers.<sup>1</sup>

On January 6, 1943 the Union filed a charge against Petitioners (R. 9) with the Regional Director, charging that Petitioners were engaging in unfair labor practices within the meaning of Sections 8 (1) and 8 (5) of the National Labor Relations Act in that Petitioners have since November 25, 1942 refused to recognize the Union as the representative of Petitioners' bus drivers.

On January 7, 1943 the Regional Director issued and served upon Petitioners a "Complaint" (R. 10), in which complaint is made regarding said unfair labor practices alleged and set forth in the Union's charge. On January 15, 1943 Petitioners filed with the Regional Director their "Answer to Complaint" (R. 16).

On January 27, 1943 hearing was held at Cincinnati, Ohio, on the "Unfair Labor Practice Complaint," with William P. Webb presiding as Trial Examiner (R. 51-126).

On February 18, 1943 Trial Examiner Webb made and filed with the Board his "Intermediate Report" (R. 19) recommending that the Union's Complaint against Petitioners be dismissed in its entirety.

On February 20, 1943, the Chief of the Order Section transferred the case to the Board as Case No. C-2533.

On March 6, 1943, the Union filed a "Statement of Exceptions to Intermediate Report of Trial Examiner" and a brief in support of such exceptions with the Board (R. 38).

The Board, on April 27, 1943, made its "Decision and Order" (R. 42) in which it found that Petitioners have

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<sup>1</sup> The "Petition for Declaratory Judgment" was dismissed without prejudice by the District Court, at Petitioners' Request, on March 8, 1943, after Trial Examiner Webb's "Intermediate Report" (R. 19) was made on February 18, 1943, in which he recommended to the Board that the Union's Complaint against Petitioners be dismissed in its entirety.

engaged in and are engaging in unfair labor practices in that Petitioners refused to bargain collectively with the Union and ordered Petitioners to cease and desist therefrom and to bargain collectively upon request with the Union.

Enforcement of the above order was sought by the Petitioners in the Circuit Court of Appeals for the Sixth Circuit and the order of the National Labor Relations Board was affirmed by the Court. A timely application for rehearing was also filed, which was overruled on April 7, 1944. A certified copy of the entire record of said case in the United States Circuit Court of Appeals is attached and made a part of this petition and marked "Exhibit A" in compliance with the rules of this Court.

### **Assignments of Error.**

Your Petitioners assign as error the refusal of the United States Circuit Court of Appeals to reverse the order of the National Labor Relations Board, finding that the Petitioners were engaged in unfair labor practices within the meaning of Section 8 (5) (1) of the National Labor Relations Act and in failing to set aside the Board's Order requiring the corporation to cease and desist from their unfair labor practices and to take certain affirmative action.

### **Reasons for Allowance of Writ.**

Your Petitioners are advised and believe that said judgment is erroneous and contrary to the decisions of this Honorable Court in similar causes; that the wrong construction and application of the aforesaid Act of Congress was made by said Circuit Court of Appeals; that the said Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Honorable Court; and that this Honorable

Court should require the case to be certified to it for its review and determination in conformity with the provisions of U. S. C. A. Title 28, Sec. 347, formerly Sec. 240 of the Judicial Code.

Wherefore, your Petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and of all of the proceedings of said Circuit Court of Appeals in said case entitled "National Labor Relations Board vs. Capitol Greyhound Lines and Capitol Greyhound Lines of Indiana, Inc." to the end that the case may be reviewed and determined by this Honorable Court, as provided by U. S. C. A. Title 28, Sec. 347 (Sec. 240, Judicial Code as amended) and that the said judgment of said Circuit Court of Appeals for the Sixth Judicial Circuit in said case and every part thereof may be reversed by this Honorable Court.

CAPITOL GREYHOUND LINES and  
CAPITOL GREYHOUND LINES OF  
INDIANA, INC.,  
By THOMAS L. TALLENTIRE,  
LEONARD GARVER, JR.,  
*Counsel for Petitioners.*

STATE OF OHIO,  
*County of Hamilton, ss:*

Thomas L. Tallentire, being first duly sworn, deposes and says that he is the Attorney for Petitioners and that said Petitioners, to-wit: Capitol Greyhound Lines is a corporation organized under the laws of the State of Virginia and Capitol Greyhound Lines of Indiana, Inc., is a corporation organized under the laws of the State of

Indiana; and that the facts set forth in the foregoing petition for certiorari and all the exhibits attached thereto, are true as he verily believes.

THOMAS L. TALLENTIRE.

Sworn to before me and subscribed in my presence this 10th day of May, 1944.

[SEAL.]

HELEN MCCLURE,  
*Notary Public in and for*  
*Hamilton County, Ohio.*

I certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

THOMAS L. TALLENTIRE,  
*Counsel for Petitioners.*

